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NOTE AND COMMENT.

ATTEMPT, ASSAULT, AND ASSAULT WITH INTENT.—The case of *State* v. *Lewis*, 154 N. W. 432, decided in October, 1915, by the Supreme Court of Iowa, has an interesting bearing upon the law of assault and of criminal attempts. Two men, Tropp and Cox, observed a third, Dunlevy, asleep on a cot with a pocketbook under his pillow. Tropp armed himself with a leather sap and a loaded revolver and moved quietly to the head of the cot, when Dunlevy, feeling the presence of some one in the room, sprang to his feet. Tropp fled from the room with Dunlevy after him, but fell before making his escape. Dunlevy undertook to secure him, but Cox came up from behind with a lead pipe and struck Dunlevy over the head. Tropp and Dunlevy both testified that Tropp did not speak to or touch Dunlevy, but Tropp stated that he "made a movement" under the pillow. Tropp pleaded guilty to a charge of assault with intent to commit robbery, but one Lewis, who was charged with aiding and abetting in this same crime, contended that there was no evidence that Tropp had committed an assault with intent to rob.

In holding that there was sufficient evidence of this crime to carry the issues to the jury, the court discarded the assault by Cox with the lead pipe, on the ground that there was not the requisite intent present, the intent to

rob having then been abandoned. Another solution, which seems quite tenable, might have been found in the fact that Dunlevy was awakened by the approach or presence of Tropp, and was therefore in all likelihood put in fear of injury. It is now quite generally accepted that an act which puts one in reasonable apprehension of danger is an assault. *State* v. *Shepard,* 10 Iowa, 126; McCLAIN, CRIM. L., § 233. But the court did not consider or discuss this solution. It did, however, consider the "movement" made by Tropp under Dunlevy's pillow, but concluded that this could not be an assault, because it was made "for the purpose of obtaining the money and without intention to touch or injure Dunlevy in any manner." This statement involves a confusion between intent and purpose. If Tropp touched the person of Dunlevy with intent to touch him, the fact that his purpose was to obtain the pocketbook could not affect the nature of the act done. McCLAIN, § 120; *Rex* v. *Regan,* 4 Cox C. C. 335; *Rex* v. *Gillow,* 1 Moody, 85. That the pillow was part of Dunlevy's person for the purposes considered seems fairly well established. *Clark* v. *Downing,* 55 Vt. 259; *Respublica* v. *DeLongchamps,* 1 Dall. (U. S.) 111; *State* v. *Davis,* 1 Hill (S. Car.) 45. The element of hostility, or malicious desire to injure, which is probably lacking here, cannot be said to be a necessary element of assault. The want of it appears to defeat the charge only where the facts show a spirit of play or sport. *People* v. *Ryan,* 239 Ill. 410, 88 N. E. 170.

Passing these three possibilities, the court finds the required assault in the act of Tropp in arming himself as described and in approaching the cot and sleeper. This act was held to be "a definite menace of violence against the person of Dunlevy," and indicative of the intent to take the sleeper's property by force or violence, disregarding, on the authority of *State* v. *Mitchell,* 139 Iowa, 455, 116 N. W. 808, the fact that the intent to employ violence was conditioned upon there arising a necessity for the use of violence. See also McCLAIN, § 232; *People* v. *Courier,* 79 Mich. 366, 368; and *Commonwealth* v. *Roosnell,* 143 Mass. 32. This raises the question whether an attempt to do violence to an unconscious person is an assault. Certainly no civil action would arise for such an act. COOLEY, TORTS (3rd ed.), 278; SALMOND, TORTS, 348; POLLOCK, TORTS (WEBB'S AM. ED. OF 1894), 247, 249n; I JAGGARD, TORTS, 433; I STREET, FOUNDATIONS OF LEGAL LIABILITY, 10. The contrary view is expressed by BIGELOW, TORTS (8th ed.), 324n. To allow such an action would considerably enlarge the field of actionable wrongs. There would seem to be no more reason for holding that a man has a right to be secure from attempted batteries than from attempted conversions or attempted breaches of contract. But the law of crimes everywhere recognizes the criminality of attempts, and an attempted battery, like an attempted murder or larceny, is very properly punishable. Nearly all such attempted batteries are acts which put the intended victim in fear of bodily harm, but the principal case, if we disregard the awakening, as did the court, presents the exceptional circumstances that warrant a re-examination of our premises.

One frequently meets the dogmatic statement that every battery includes an assault. In the writer's opinion, it would be more correct to say that

every battery is an assault. In the early period of our law, assault was probably limited to beating, recognition of the inchoate beating constituting a later development. See 2 POLLOCK & MAITLAND, 466, 525. The first known case of the latter sort was in 1348, when a recovery was allowed against a defendant who had thrown a hatchet at the plaintiff's wife, though she had not been hit. *I. DeS. et ux.* v. *W. De S.*, Y. B., Lib. Ass., fol. 99, pl. 60, included in I AMES, CASES ON TORTS, 1, and in I BOHLEN, CASES ON TORTS, 10. If we examine the etymology of the word "assault," and consider the class of injuries it is in principle designed to include, we must conclude that both the beating and the arousing of fear are but methods of committing the assault. When there is a beating there need logically be no putting in fear. Therefore there may quite conceivably be an attempted assault, consisting in attempted beating, which is not an assault by putting in fear. There may be a logical hiatus in calling an attempted assault an assault; yet there is obvious inconvenience in requiring a different charge to be laid according as there exist or do not exist the elements of actual beating or of putting in fear, facts which are often doubtful of proof. The question only touches procedure, for the assault and attempt are crimes of equal grade. Historically, attempts at violence to the person were assaults before the development of the law of criminal attempts. And as a matter of modern opinion, criminal assault has usually been defined as an attempt or offer of violence to the person. MCCLAIN, CRIM. L., § 231; *People* v. *Lilley*, 43 Mich. 521, 5 N. W. 982; *Chapman* v. *State*, 78 Ala. 463, 56 Am. Rep. 42.

Where, as in the case we are considering, we have to deal with aggravated assault, there seems to be justification for a yet broader conception of assault. Except for an abortive effort in the time of Lord COKE to treat attempted murder as murder, attempts at crime have been but misdemeanors at common law, whether viewed as assaults or as attempts, under the comparatively modern doctrine that every attempt to commit a crime is itself a crime. II STEPHEN, HISTORY OF CRIMINAL LAW IN ENGLAND, 221–224; RUSSELL, CRIMES (8th Am. Ed.), 46. The inadequacy of such law in the case of attempts to commit the greater crimes led to a great amount of legislation, beginning in 1682 with the COVENTRY ACT, 22 & 23 Chas. II, c. 1. This and the succeeding English statutes, instead of severely penalizing attempts to commit certain particular crimes, enumerated the many acts, as wounding, attempting to administer poison, attempting to drown, attempting to discharge loaded fire-arms, et cetera, which, if done with intent to commit murder, to maim, to disfigure, et cetera, should be severely punished. III STEPHEN, 108 et seq. Nothing could be clumsier or more inexpedient. The earlier statutes were extremely incomplete, the last contains seventy-nine sections. The advantage of the phraseology, usually employed in the corresponding American statutes, "assault with intent," should be apparent. It would therefore seem that statutes such as that involved in the principal case were designed to effect a classification of criminal attempts as to punishability by an indirect method, defining the more serious attempts as assaults with intent. Since the gist of the offense is the intent, the act-element

should be considered sufficient if it satisfies the elastic principle of the law of attempt, that is, that it be an act in execution of the intent and going beyond mere preparation. It should not be permissible to take the word "assault" from its context and subject it to the gruelling of six centuries of critical definition. We should remember the words of Justice HOLMES, "The life of the law has not been logic: it has been experience."

Such a broad reading of the word "assault" is obviously involved in those cases, representing the majority view, which hold that an attempt to have intercourse with a girl, of such age that intercourse with her would be statutory rape, is assault with intent to rape, even though the girl consents to all that is done. MCCLAIN, § 464. If it be said that the girl is incapable of consenting, a yet looser statutory construction is involved. In the absence of any statute she was capable of consenting to intercourse and to any touching of her person not endangering life or limb, and the statute making intercourse with her a crime does not say she is incapable of consenting, but simply ignores completely the matter of consent. The act of intercourse is made criminal without the elements of non-consent and force which are essential to common law rape. This leaves her capable of consenting to a touching of her person not accompanied by the intent to take sexual liberties, and to say that it deprives her of capacity to consent to a touching with such intent is to read into the statute a provision which is not there. It is not merely a broad reading of the terms used by the legislature, it is an addition to a quite specific statute, of a quite specific provision covering a different, though related, subject-matter. It would seem much more permissible to say that in the other statute, punishing the assault with intent, "assault" was used in a somewhat loose sense. See *Russell* v. *The State*, 64 Kas. 798.

Two Georgia cases have refused to come to this conclusion in regard to aggravated assault. The case of *Peebles* v. *State*, 101 Ga. 585, held that putting poison into a well, with the intention that others should be killed by drinking the water, was not an assault with intent to commit murder unless the water was in fact drunk. The court dismissed the case briefly, saying, "As there was no assault proved, the conviction cannot be sustained." This case was followed by *Leary* v. *State*, 13 Ga. App. 626, commented upon in 12 MICH. LAW REV. 230. The result is obviously unsatisfactory. The present case, though doubtful on authority, pays a real regard to the purpose of statutory aggravated assault, and seems justified by the historical and criminalogical situation of the law of criminal attempts. R. W.

PRIORITY OF LIEN OF JUDGMENT.—By a recent decision of the New York Court of Appeals (*Hulbert* v. *Hulbert, et al.*, 111 N. E. 70) there has, in effect, been a check placed upon the rights of "the diligent." In that case the court held that as between several judgments becoming liens simultaneously upon after-acquired property of a judgment debtor, one of such judgments does not acquire a preference by issue of execution and advertisement